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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 267

J. J. O'LEARY, DEPUTY COMMISSIONER, FOURTEENTH COMPENSATION DISTRICT, ETC., PETITIONER

vs.

BROWN-PACIFIC-MAXON, INC., A CORPORATION, AND HARTFORD ACCIDENT AND INDEMNITY COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 24, 1950

CERTIORARI GRANTED OCTOBER 16, 1950

No. 12366

United States
Court of Appeals
For the Ninth Circuit.

BROWN-PACIFIC-MAXON, INC., a corporation and HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,

Appellant,

vs.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Western District of Washington,
Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the Western District of Washington, Northern Division

No. 2226

BROWN-PACIFIC-MAXON, INC., a corporation, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,

Plaintiffs,

vs.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act,

Defendant.

PETITION FOR INJUNCTION

For cause of action against the defendant, plaintiffs allege:

I.

That plaintiff, Brown-Pacific-Maxon, was during all times material to this petition, a corporation engaged in construction work on the Island of Guam for the United States Navy and an employer within the provisions of the Longshoremen's and Harbor Workers' Act, hereinafter referred to as the "Act."

II.

That plaintiff, Hartford Accident and Indemnity Company, is now and at all times herein mentioned was an insurance company organized as a corporation under and by virtue of the laws of the State of Connecticut and an insurance carrier secured by plaintiff, Brown-Pacific-Maxon, in accordance with the Act.

III.

That defendant, J. J. O'Leary, is now and at all times herein mentioned, the Deputy Commissioner of the Fourteenth Compensation District under the provisions of this Act.

IV.

That the deceased workman, John Valak, was born January 3, 1918, and was unmarried at the time he died by drowning near Guam on Midway Island, November 9, 1947, leaving surviving him his mother, Mrs. Mary Valak.

V.

That the said decedent, John Valak, was employed by Brown-Pacific-Maxon at Guam as a heavy duty mechanic and was not required to work on Sundays.

VI.

That plaintiff, Brown-Pacific-Maxon, a corporation, employer, maintained and operated Camp Ethridge on Midway Island, Guam, as a recreational center available not only to its employees and their families and friends, but also to the employees of other civilian contractors on Midway Island; that a concrete swimming pool was maintained ashore at the camp, supervised by a paid lifeguard, where patrons of the camp were required to swim.

VII.

That on Sunday, November 9, 1947, decedent and other fellow-employees of Brown-Pacific-Maxon, left their residence at Camp 1, Guam, for the purpose of visiting Camp Ethridge for relaxation purposes; that about 4:15 p.m. that afternoon, decedent and

other fellow workmen were preparing to leave Camp Ethridge by bus for Camp 1 when decedent heard a person standing on a reef off shore in the ocean shouting for assistance; that the reef was located about 350 yards off shore and the waters leading thereto were quite shallow except in the channel of the Togcha River, which passed by the reef.

VIII.

That although various camp officials warned against making an attempt to rescue the distressed individual because of the hazards involved, decedent and others went to his rescue; that Valak swam out in the direction of the reef, when he became caught in the cross-currents of the river channel of the Togcha River and Valak was overcome and despite efforts of other individuals to rescue him, drowned and his body was not recovered until the following day, November 10, 1947.

IX.

That the identity or employment of the distressed individual signaling for assistance on the reef was never ascertained.

X.

That on or about August 21, 1948, Mrs. Mary Valak, surviving mother of John Valak, deceased, filed a claim with the Deputy Commissioner for compensation under the Longshoremen's and Harbor Workers' Act; that plaintiffs controverted said claim for the reason that the death of the said John Valak did not arise out of or in the course of employment.

XI.

That on February 11, 1949, a hearing on said claim was held pursuant to the provisions of said Act, before defendant, J. J. O'Leary, Deputy Commissioner, which hearing resulted in a compensation order and award of compensation being filed by J. J. O'Leary, Deputy Commissioner, in his office on March 2, 1949, a copy of which compensation order and award of compensation is attached hereto, marked Exhibit "A" and by reference made a part hereof as though fully set forth.

XII.

That a certified copy of the transcript of testimony taken at said hearing, together with all exhibits filed and received in evidence in connection therewith, will be filed in this cause under the certificate of said Deputy Commissioner, which said testimony and exhibits are by this reference made a part hereof and incorporated herein, as though fully set forth. That the facts in connection with said claim are not in dispute and the sole question presented to said Deputy Commissioner was whether the death of the said John Valak arose out of or in the course of his employment as an employee of plaintiff, Brown-Pacific-Maxon.

XIII.

That Section 2 of the Longshoremen's and Harbor Workers' Act provides as follows in part:

> "(2) The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such

employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against the employee because of his employment."

XIV.

That at the time of his death, the decedent, John Valak, was not engaged in any work arising out of or in the course of his employment, but was on a holiday and his attempted rescue of the unknown individual on the reef which led to his death was not an act in furtherance of his employer's interests nor an act arising out of or in the course of such employment.

XV.

That said compensation order and award of compensation being not in accordance with law, should be suspended and set aside.

XVI.

That less than thirty (30) days have elapsed since the entry and filing of said compensation order and award of compensation and the plaintiffs have no relief or adequate remedy at law.

Wherefore, plaintiffs pray for judgment as follows:

That a decree be entered herein adjudging said compensation and award dated March 2, 1949 and attached hereto and made a part hereof as Exhibit "A" to be unlawful and contrary to the provisions of said Act and directing that said award be suspended and set aside and the defendant be enjoined from enforcing the same; and

For such other, further or different relief as to the court may seem equitable and just.

/s/ BOGLE, BOGLE & GATES,
/s/ EDW. S. FRANKLIN,
Attorneys for Plaintiffs.

EXHIBIT A

Federal Security Agency
Bureau of Employees' Compensation
Fourteenth Compensation District
Case No. DB-P-583-787

In the Matter of:

The claim for compensation, under the Longshoremen's and Harbor Workers' Compensation Act as extended by the Act of August 16, 1941, as amended (42 USC 1651)

MARY VALAK

Claimant,

(John Valak, Deceased Employee)

against

BROWN-PACIFIC-MAXON

Employer,

HARTFORD ACCIDENT & INDEMNITY COMPANY

Insurance Carrier.

COMPENSATION ORDER AWARD OF DEATH BENEFITS

A claim for compensation having been filed in

the Pacific District in consequence of the death of the employee above-named and said claim having been transferred to the undersigned Deputy Commissioner by the Deputy Commissioner of said Pacific District with the approval of the Bureau of Employees' Compensation, Federal Security Agency, and such investigation in respect to the above-entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

Findings of Fact

That on the 9th day of November, 1947, the deceased above-named was in the employ of the employer above-named at Guam, Marianas Islands, in the Pacific Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act as extended by the Act of August 16, 1941, as amended (42 USC 1651) to employees of contractors with the United States and others employed outside the United States, and that the liability of the employer for compensation under the said Act was insured by the Hartford Accident & Indemnity Company; that the employer maintained and supervised a recreation center at Camp Ethridge; that said recreational center was maintained for the benefit of employees of the employer and others; that it was common practice for the employees of the employer to use such recreational facilities thus provided, on Sun-

days and weekdays, whenever they were disposed to use them; that for such purpose the employer transported its employees to and from the recreational center without charge; that on Sunday, November 9, 1947, the deceased herein was availing himself of the use of the recreational center; that during the afternoon of said day it appeared to the onlookers on shore that two men were in distress on one of the reefs; that the deceased, along with a number of other persons, joined in an attempt to rescue the two men and while so engaged the deceased was drowned and his body was not recovered until the following day; that at the time of his drowning and death the deceased was using the recreational facilities sponsored and made available by the employer for the use of its employees and such participation by the deceased was an incident of his employment, and that his drowning and death arose out of and in the course of said employment, and was not occasioned by his wilful intention to injure or kill himself; that written notice of death was not given within thirty days, but that the employer had knowledge of the death and has not been prejudiced by the lack of such written notice; that the average annual earnings of the deceased herein at the time of his death exceeded $1,950.00; that the claimant, Mary Valak, who was born March 4, 1882, is the surviving dependent mother of the deceased employee and as such is entitled to death benefits for her support at the rate

of $9.38 per week; that the accrued death benefits due said Mary Valak from November 9, 1947 to February 26, 1949, inclusive, amount to $637.84; that no burial expenses were incurred as the deceased was buried in a military cemetery on the Island of Guam; that nothing has been paid to the claimant as death benefits.

Upon the foregoing facts the Deputy Commissioner makes the following

Award

That the employer, Brown-Pacific-Maxon, and the insurance carrier, Hartford Accident & Indemnity Company, shall pay to the claimant, Mary Valak, death benefits as follows: 68 weeks at $9.38 per week from November 9, 1947 to February 26, 1949, inclusive, in the amount of $637.84, which amount the employer and insurance carrier are directed to pay forthwith in one sum (less attorney's fee hereinafter provided for) and shall thereafter continue payments of death benefits at the rate of $9.38 per week payable in biweekly installments subject to the limitations of the Act or until otherwise ordered.

A fee in the amount of $100.00 is hereby approved in favor of Clark W. Adams, Attorney, 103-104 Becker Building, Aberdeen, Washington, for services rendered the claimant in connection with the presentation of her claim for compensation, same to

be a lien upon and deducted from the payment of this award.

Given under my hand at Seattle, Washington this 2nd day of March, 1949.

J. J. O'LEARY,
Deputy Commissioner
Fourteenth Compensation
District.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer and the insurance carrier, at the last known address of each as follows:

Mrs. Mary Valak, Route 1, Box 330A, Aberdeen, Washington.

Brown-Pacific-Maxon, Ferry Building, San Francisco, California.

Hartford Accident & Indemnity Co., Hartford Building, San Francisco, California.

Regular Mail

Hartford Accident & Indemnity Co., 711 Dexter Horton Bldg., Seattle, Washington.

Bogle, Bogle & Gates, Central Building, Seattle, Washington.

/s/ J. J. O'LEARY,
Deputy Commissioner.

Mailed: March 2, 1949.

JJO:McL

Return receipt attached.

[Endorsed]: Filed Mar. 29, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS PETITION

Comes now Defendant J. J. O'Leary, deputy commissioner, Bureau of Employees' Compensation, Federal Security Agency, by his attorneys and moves this Honorable Court to dismiss the petition for injunction filed herein for the following reasons:

1. That the petition does not state a cause of action and does not entitle plaintiffs to any relief, nor does such petition state a claim against defendant upon which relief can be granted.

2. That it appears from the petition, including the transcript of testimony taken before the deputy commissioner on February 11, 1949, the exhibits, and the compensation order complained of, all of which are made parts of the petition, that the employee's death in this case arose out of and in the course of his employment.

3. That it appears from the petition that the compensation order complained of is in all respects in accordance with law.

4. For such other good and sufficient reason as may be shown.

/s/ J. CHARLES DENNIS,
U. S. Attorney
Attorney for Deputy
Commissioner O'Leary.

Receipt of copy acknowledged.

[Endorsed]: Filed June 3, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Cause coming on regularly for hearing on August 11, 1949, on motion of the defendant J. J. O'Leary, Deputy Commissioner, to dismiss on the ground that the complaint did not state facts sufficient to grant any relief to the plaintiffs herein, plaintiffs appearing by their attorneys, Bogle, Bogle and Gates, the defendant appearing by J. Charles Dennis, United States Attorney for the Western District of Washington, the Court having read and considered the evidence as given before the Deputy Commissioner and the order of award and compensation, all of which were attached to and made a part of the complaint, now, therefore,

The Court Finds the Following Facts

1. That there is substantial evidence contained in the hearings held by Deputy Commissioner J. J. O'Leary, Deputy Commissioner, Fourteenth Compensation District, Bureau of Employees' Compensation, Federal Security Agency, to sustain the compensation order issued by defendant J. J. O'Leary in the above matter on March 2nd, 1949, in Compensation Order Award, Case No. DB-P-583-787, a copy of said order and award being at-

tached to and made a part of the complaint in this cause.

Done in Open Court this 18th day of August, 1949.

/s/ JOHN C. BOWEN,
U. S. District Judge.

And as Conclusions of Law from the foregoing facts, the Court Finds:

That the defendant is entitled to a decree dismissing the complaint with prejudice, and confirming the award of the Deputy Commissioner herein.

Done in Open Court this 18th day of August, 1949.

/s/ JOHN C. BOWEN,
U. S. District Judge.

Presented by:

/s/ J. CHARLES DENNIS,
U. S. Attorney.

Approved as to Form Only:

BOGLE, BOGLE & GATES,
Attorneys for Plaintiffs.

By /s/ EDW. S. FRANKLIN.

[Endorsed]: Filed Aug. 18, 1949.

United States District Court, Western District of Washington, Northern Division

No. 2226

BROWN-PACIFIC-MAXON, INC., a corporation, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,

Plaintiffs,

vs.

J. J. O'Leary, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act,

Defendant.

DECREE

This Cause coming on regularly for hearing on August 11, 1949, on motion of the defendant J. J. O'Leary, Deputy Commissioner, to dismiss on the ground that the complaint did not state facts sufficient to grant any relief to the plaintiffs herein, plaintiffs appearing by their attorneys, Bogle, Bogle and Gates, the defendant appearing by J. Charles Dennis, United States Attorney for the Western District of Washington, the Court having duly and regularly considered the briefs filed by the respective parties and the argument of counsel, and having read and considered the evidence as given before the Deputy Commissioner and the order of award and compensation, all of which were attached to and made a part of the complaint herein, and the Court

having signed and filed Findings of Fact and Conclusions of Law, now, therefore, it is hereby

Ordered, Adjudged and Decreed:

1. That the complaint of the plaintiffs herein be dismissed with prejudice.

2. That the compensation order and award of compensation signed by J. J. O'Leary, Deputy Commissioner, and filed in his office on March 2nd, 1949, a copy of which is attached to and made a part of the complaint and designated as Compensation Order Award of Death Benefits, Case No. DB-P-583-787, be in all respects ratified and confirmed.

Done in Open Court this 18th day of August, 1949.

/s/ JOHN C. BOWEN,
U. S. District Judge.

Presented by:

/s/ J. CHARLES DENNIS,
U. S. Attorney.

Approved as to Form Only:

BOGLE, BOGLE & GATES,
Attorneys for Plaintiffs.

By /s/ EDW. S. FRANKLIN.

[Endorsed]: Filed and entered Aug. 18, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Brown-Pacific-Maxon, Inc., a corporation, and Hartford Accident and Indemnity Company, a corporation, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final Decree and Judgment entered in this court on the 18th day of August, 1949.

Dated this 9th day of September, 1949.

BOGLE, BOGLE & GATES,
/s/ EDW. S. FRANKLIN,

Attorneys for Plaintiffs, Brown-Pacific-Maxon, Inc., a corporation, and Hartford Accident & Indemnity Company, a corporation.

[Endorsed]: Filed September 9, 1949.

Federal Security Agency Bureau of Employees' Compensation

Case No. DB-P-583-787

MRS. MARY VALAK, Mother of JOHN VALAK, Deceased Employee,

Claimant,

vs.

BROWN-PACIFIC-MAXON,

Employer,

HARTFORD ACCIDENT AND INDEMNITY CO.,

Insurance Carrier.

Before: J. J. O'Leary,
Deputy Commissioner, Fourteenth Compensation District, Seattle, Washington

TRANSCRIPT OF TESTIMONY AT HEARING

Pursuant to notice this matter was heard before J. J. O'Leary, Deputy Commissioner, Federal Security Agency, Bureau of Employees' Compensation, at Room 604—905 Second Avenue Building, Seattle, Washington, on February 11, 1949. [1*]

Appearances:

HON. CLARK W. ADAMS,
Decker Building,
Aberdeen, Washington.
Representing the Claimant.

* Page numbering appearing at foot of page of original Reporter's Transcript.

HON. EDWARD S. FRANKLIN,
BOGLE, BOGLE & GATES,
602-635 Central Building,
Seattle, Washington.
For Employer and Carrier. [2]

Proceedings
February 11, 1949

Deputy Commissioner O'Leary: This hearing is upon the application of the insurance carrier and it follows the filing of a claim for death benefits by Mary Valak, as dependent mother of John Valak, who was drowned at Guam, Mariana Islands, on November 9, 1947.

This case comes within the *preview* of Public Law 208, 77th Congress, approved August 16, 1941, which extended the provisions of the *Longden's* and Harbor Workers' Compensation Act to apply in case of injury or death of employees of contractors with the United States, who are employed outside the continental United States.

It appears from the papers already on file that the deceased was drowned when he attempted to rescue a man, who appeared to be in danger on a reef some distance from shore at Camp Ethridge, which camp was maintained and operated by Brown-Pacific-Maxon as a recreational center. The deceased was employed as a mechanic by said Company.

Mr. Franklin, on what grounds is this claim resisted?

Mr. Franklin: It is the position of the employer and carrier that the death of Mr. Valak did not occur in the course of employment under the Longshoremen's and Harbor Workers' Act. [3]

Deputy Commissioner O'Leary: Mr. Adams, will you be good enough to state the claimant's position at this time?

Mr. Adams: Of course, it is our position that he did meet his death while in the course of his employment and that Mrs. Mary Valak was a dependent.

MRS. MARY VALAK

Claimant, was duly sworn and testified as follows:

By Mr. O'Leary:

Q. Tell us your full name and home address, please?

A. My name is Mary Valak. My address—and the address is Route 1, Box 330A, Aberdeen, Washington.

Q. Now, Mrs. Valak, you are the mother of John Valak? A. Yes.

Q. Is your husband living? A. Yes.

Q. Living with you?

A. No. He has not lived with us for the past twenty-five years.

Q. Your son John—did he live with you before he left the United States for Guam?

A. I raised him and he lived with me all the time, only when he joined the Navy, and when he was of age.

Q. Was your son married? A. No. [4]

(Testimony of Mrs. Mary Valak.)

Q. How old was he? A. Twenty-nine years.

Q. How long had he been on Guam before you learned of his death? A. About three months.

Q. While on Guam did he send you any money?

A. He told me he would put me on a pension and he sent me $24.90 every week.

Q. How did he send it to you?

A. Through the bank in California. I don't remember the address.

Mr. Adams: It is just a bank in California.

Q. (By Mr. O'Leary): Did he have a checking account in this bank?

A. I don't know how it was. It was from his wages every week. The first month he didn't send me but after one month when he was working he sent me a check of $24.90 every week.

Q. And those checks arrived each week until his death?

A. Yes. The last check I received was a month later.

Q. That was a salary check?

A. No, the same check, $24.90.

Q. How long after he died did you receive that?

A. It was shortly after my son's death I received the last check and that was $24.90.

Q. Before your son went to Guam you say he lived with you? [5] A. Yes.

Q. Was he working at that time?

A. He just come from Alaska a short time before.

(Testimony of Mrs. Mary Valak.)

Q. And he came down from Alaska and arranged to go to Guam?

A. Yes. And he remained home for two months before he went to Guam.

Q. While he was in Alaska, did he send you money?

A. He sent all the money home and I was handling the money. I put the money in his name and he sent me one time, he sent me two hundred and sixty dollars to my address and for my own use.

Q. That was while he was in Alaska?

A. Yes.

Q. When was that?

A. That was the year before he went to Guam.

Q. How long were you dependent upon your son John for support?

A. Ever since he began to work.

Q. When did he start to work?

A. I think he was first on 1940 at Boeing Contract.

Q. Were you dependent upon him for support at that time? A. Yes.

Q. Did he contribute to your support at that time? A. Yes.

Q. And all through the years he continued to support you? [6]

A. Yes, sir, and he was working for an electrical company overseas a year and a half and he sent all the money home to me. That was during the war. He wrote me one time and he said he would have to

(Testimony of Mrs. Mary Valak.)

give up and go places at New Guinea. That was over two years.

Q. Do you know anything about the facts concerning your son's death on Guam?

A. No. Then I have support, fifty dollars every week in the Army. He was in the Army and made an allotment of fifty dollars.

Q. And you received that money regularly?

A. Yes.

Mr. Adams: That support is covered. Here is a letter which shows he was sending her money.

Q. (By Mr. O'Leary): How old are you?

A. Sixty-six.

Q. I know you don't mind telling us.

A. No.

Q. Have you any children? A. No.

Q. John was your only son? A. Yes.

Mr. O'Leary: Do you wish to offer this in evidence, Mr. Adams?

Mr. Adams: Yes. [7]

Mr. O'Leary: Is there any objection to this letter being offered in evidence, Mr. Franklin?

Mr. Franklin: No.

Mr. O'Leary: Letter dated September 6, 1947, signed by John Valak, and addressed to his mother at her present home address will be received in evidence and will be marked Claimant's Exhibit "A."

(Testimony of Mrs. Mary Valak.)

CLAIMANT'S EXHIBIT "A"

Sept. 6, 1947

Dear Mother,

Received your letter of Aug. 31. Glad to hear everything is going O.K. However, I'm sorry about my check not coming thru yet, but don't worry, several other fellows I know haven't received theirs yet, they take their sweet time about things like that.

I don't quite understand your letter but I take that 204 dollars you refer to, as my terminal leave pay. Am I right? If you can cash it you may do so.

I don't know how long it will be before you start getting checks but it shouldn't be long. They won't be very big to start with because the company is holding back some money for the first 3 months, which I'll get after I finish my contract.

The money you do get is yours, the check will be made out in your name. When I say it's yours I mean it—it's your "pension." The rest of the money I'm having banked at San. Fran. I may buy a new car when I get back and I thought it would be nice to get it in San Francisco and drive home.

Everything is going well with me. I'm doing work I'm familiar with and I like it. I also have a good gang of men to work with. The food and quarters are very good. I have everything I need except sox, could you send me a dozen pair of white cotton soxs? Size 11.

(Testimony of Mrs. Mary Valak.)

It's the rainy season here now. Yesterday it rained 2⅛ inches! How it does come down!

Met a fellow that slept right longside of me in Ireland. If I keep on traveling I won't be able to go any place without running into someone I know. Well—more later—Good night and hello to everyone.

Love,

/s/ JOHNNY.

Air Mail envelope postmarked, Guam, Oct. 10, 1947, with return address of John Valak, addressed to Mrs. Mary Valak, Rt. 1 Box 330A, Aberdeen, Washington, and cancelled five cent Air Mail stamp attached.

Mr. O'Leary: Do you have any questions, Mr. Adams?

Examination

By Mr. Adams:

Q. You state your husband is living?

A. Yes.

Q. And you got a divorce from him about twenty-five years ago? A. Yes.

Q. And that you have not lived with him since?

A. Yes. I have not lived with him since.

Q. And you have no other means of support except from your son? A. No.

Mr. O'Leary: Any questions, Mr. Franklin?

Mr. Franklin: Yes. [8]

(Testimony of Mrs. Mary Valak.)

Cross-Examination

By Mr. Franklin:

Q. How long did your son work in Alaska?

A. He had a contract for one year.

Q. And when did he go up to Alaska?

A. About a year, a short time after he was discharged. I don't know when.

Q. Discharged from the Navy? A. Yes.

Q. Whom did he work for?

A. I don't know.

Q. Do you know the name of the contractor?

A. I don't know the name of the contractor.

Q. When he was in Alaska, he sent you his money?

A. Yes and what I needed for myself I used.

Q. And the rest you put in the bank, the savings bank for your son? A. I put some in for him.

Q. Did he make you any regular pension payments?

A. Yes. He gave me over two hundred and fifty dollars on "Mother's Days" and besides that he sent money home. I don't know how much it was.

Q. In other words, he sent you his check and you used what you needed? A. Yes.

Q. Mrs. Valak, have you got any receipts or drafts in your [9] possession at this time?

(No answer.)

Q. You don't understand that? A. No.

(Testimony of Mrs. Mary Valak.)

Q. When he sent money from Alaska, how did he send it, money order or bank check?

A. I think it was bank check.

Q. And then you would go to the bank with the check? A. I went to the post office.

Q. Are you receiving the old age pension now, Mrs. Valak? A. No.

Mr. Franklin: That's all.

Mr. Adams: At this time I would like to introduce into the record statements taken by Brown-Pacific-Maxon Company of Henry P. Butryn, dated November 14, 1947, and a report of Earl N. Bennett, Police Captain, Guam, dated November 9, 1947, and a statement of John McNally, dated the tenth day of November 1947, and a statement of Hugh N. Pendleton, dated November 15, 1947.

Mr. O'Leary: Have you any objections?

Mr. Franklin: No, except that we reserve the right, if we deem it necessary, to call some of those witnesses.

Mr. O'Leary: The statements just referred to and offered by counsel for claimant will be received in [10] evidence and will be marked Claimant's Exhibit "B."

CLAIMANT EXHIBIT "B"

Statement by Henry P. Butryn

I am employed by Brown-Pacific-Maxon, Badge number 9575, as a Mechanic (Auto) and reside at Camp #1 on the Island of Guam, M. I.

Claimant's Exhibit "B"—(Continued)

On Sunday, November 9th, about 4:15 p.m., Howard Barenthin, Robert Barnum, John Valak and I were ready to get on the bus to leave Camp Ethridge, as the bus left at 4:30. As we got up to leave, John Valak heard someone on the reef hollering, then we decided to go help him. We started together but I got 100 yards ahead of him (Valak). Anyway I seemed to be the first one that got caught in the channel, that's what it really was. I stopped swimming to size up the situation and then realized that I was caught in the channel in the different currents. I looked back and I saw John standing on a rock, at that time, behind me about 50 yards. Well, I knew I couldn't make it any further ahead to assist the fellow that we originally had gone out to help so I decided to go back. Then I started swimming and wasn't getting anywhere but making a little headway toward John. I stopped again and was about to tell John not to come any further out, just about then he jumped off the rock and started toward me. Naturally, the tide was coming out at that time, and when he got to me he was almost exhausted then. For two or three minutes we both just stayed afloat, he got tired and said I would have to help him so I grabbed him by the shoulder. Well, I don't know how long we were there, we just kept going up and down. One fellow passed us and I asked him to give us a hand, but he couldn't as he had all he could do to take care of himself. We just kept going up and down until McNally came

Claimant's Exhibit "B"—(Continued)

along and I asked him if he could help me with John because I just couldn't hold him afloat any longer. He grabbed hold of John and then I let go to rest. Then the tide took me out about three or 4 feet from them. I tried to make some headway, and I couldn't. I turned around to see John and McNally and it seems that there had been a wave and I saw them both twice at about two minute intervals, then that was the last time I saw them, because after that my memory is vague as to exactly what did happen because it was all I could possible do to keep afloat myself and even then I was going down and coming back up.

The next thing that I do remember was someone telling me to grab a hold on the barrel and my memory is very vague as to what happened while I was holding onto the barrel, except I do seem to remember that I was gasping for air and having a very difficult time trying to hold onto the barrel. Then I remember someone continuously telling me to get on the plywood by myself. I remember vomiting a lot, then I suppose it was about five minutes later the amphib tractor came by and picked us up.

/s/ HENRY P. BUTRYN.

/s/ HARVEY FIELDS,

Witness.

Dated: 14 November, 1947.

I am a personal friend of John Valak, and to my knowledge, he had no enemies.

/s/ HENRY P. BUTRYN.

Claimant's Exhibit "B"—(Continued)
Report of Earl N. Bennett, Police Captain,
Camp Etheridge

Drowning of John Valak, B-P-M Employee,
Sunday, November 9, 1947

At a little after 4:00 p.m. on Sunday, November 9, 1947 at Camp Etheridge, my attention was called to a person near the channel, just inside the reef, one-fourth to one-half mile off shore. This person was raising up at times until half of his body was exposed for as long as a minute and was waving toward the shore. After observing this and discussing it with Mr. Morris, First Aid Supervisor, we decided that some one may be in trouble and began to make preparations for the rescue.

Mr. Morris went to call the Sea-Air Rescue, and I, noticing that the distressed person was attracting a great deal of attention, organized the police and guards on duty (Willis and Richards) and the guard (Morren) who came on at 7:00 p.m. so as to prevent an undue number of would-be rescuers from taking to the water and endangering themselves. At the time the guard was posted along the beach there were six distinct groups of people in the water.

(1) The man in the channel was waving.

(2) A group of three with an oil barrel which included John McNally, Recreation Supervisor.

(3) Another group of three headed by Mr. Pendleton also with an oil barrel.

Claimant's Exhibit "B"—(Continued)

(4) A group of four who had a sheet of plywood with them. Included in this group was Charles Lane of Camp Lee.

(5) A group of two consisting of John Valak and H. P. Butryn who were swimming to the distressed man.

(6) Turner Hendley, Camp Etheridge life guard, who had crossed the channel and was moving to the distressed man on the north side of the channel.

Mr. Morris came back to me and reported that the Sea-Air Rescue had been located and were sending out a plane to drop a boat to the distressed man. Later, he reported to me that they were not sending a plane, but were dispatching a ship which was already on its way. Later when the ship did not arrive, he contacted 1st Marine Brigade who dispatched a "Duck" which came out after all of those in the water. Also a rescue crew came up from Camp Dealy. No other parties left the beach. After the guard was posted along same and the activities of the various groups in the water appeared to men as follows:

(1) The man in the channel remained in sight and on the life raft that I later learned he had, until picked up.

(2) The group included McNally got their barrel out into the channel and had a great deal of trouble themselves, it being necessary for them to take to the small islands near the reef. This group was

Claimant's Exhibit "B"—(Continued)

joined by Valak and Butryn; according to Butryn.

(3) The group headed by Mr. Pendleton returned to the beach, obtained lines to secure their barrel in order that they might stand in shallow water and get the barrel out to the distressed man, and rescue him. Mr. Pendleton's preparations and plans were such that appeared safe for him and his party to return so he was permitted to go back out.

(4) So far as can be determined, the party of four, including Charles Lane of Camp Lee with the plywood sheet did not reach dangerous water but returned to beach unharmed.

(5) Valak and Butryn left the beach at about 4:15 p.m. according to Butryn, after having noted that there was a man in distress and before the guard was posted on the beach, Butryn said that they arrived near the channel, he being ahead of Valak, and that Butryn swam out in the channel. He said that the current in the channel was so strong that he could only float and that he was being carried out toward the reef. He said that he warned Valak (who was on a rock) not to come out into the channel, but that he did anyway. He said that Valak found himself in trouble and that Valak asked him for help. He said he helped him so long as he could and then obtained the aid of a dark haired man who took over, when Butryn could no longer aid him. He said, that was the last time he waw Valak. A check among Valak's friends indicated that Valak, was missing.

Claimant's Exhibit "B"—(Continued)

(6) Hendley, the Etheridge life guard moved out to near the distressed man but could not get him. He talked to the distressed man and found that he had a life raft which was caught on some obstruction and that while he could not move, he was safe for several hours until such a time as help could safely reach him.

The duck from 1st Marine Brigade arrived and brought in all persons seen in the water. No one was unaccounted for except Valak. Names were not taken of all persons who were rescued; since at the time they were landed, the police were busy expediting the movement of those who needed Medical attention much of the information from Butryn was obtained from him on the morning of 10th November at the Camp #1 Dispensary.

Mr. Morris was requested to furnish names of all parties given Medical attention.

Respectfully submitted by:

/s/ EARL N. BENNETT.

Statement of John V. McNally, Camp Manager, Camp Etheridge

About 4:00 p.m., Sunday afternoon, November 9, I was standing on the North Beach of Camp Etheridge. There is a reef about 350 yards off shore. There is a shallow water from shore to reef except where a river channel runs out to reef. As the point where the channel hits the reef there are two small islands on either side of the mouth of the channel.

Claimant's Exhibit "B"—(Continued)

A man standing up to his waist in water close to north Island was waving a distress signal. He was apparently holding on to something submerged in the water.

Two men, B-P-M employees, John Valak and Henry P. Butryn, waded out toward the reef to see what the trouble was and to try to help. Another party of three or four followed them shortly and after I changed into a bathing suit, I followed them.

When I got to the channel, I saw that a man I now know as Valak, was in serious trouble. Butryn had just given up trying to help me and another man whom I can (Mr. Mann at I-J Docks—works for Pendleton—J. V. McN., 11/14/47) identify and locate but whose name I do not know was about to give up the effort. When this man saw me going to help Valak, he also came to help him again. We struggled to aid him for a time but could make no progress against the current. Valak was in desperate condition. I was nearing exhaustion. I left him and the other man abandoned him a few minutes later. Neither of us saw him go down.

I found that I could not make shallow water, as my strength was gone, but I turned on my back and found that I could stay afloat but I was shipping quite a lot of salt water. After sometime a barrel came near and I just made it. Shortly after a man whom I now know as Butryn came to the point of exhaustion and we (two others were on the barrel) aided him to hold on which he could not do for him-

Claimant's Exhibit "B"—(Continued)

self. Then a man came up on a big plywood board and we put Butryn on the plywood board which he could hold on to by himself. Butryn was throwing up and saying he didn't think he could make it. We were drifting out the channel between the islands. Two men swam to the North Island leaving Butryn, another man and me on the barrel and plywood. We drifted toward the South Island where three men with a barrel and a long rope were trying to aid us. Finally, they got the barrel close to us and one man got it and they towed him to the island leaving Butryn and me. Just then the Duck came along and picked us all up about 6:00 p.m.

When we got to shore the man who originally tried to help me with Valak, Mr. Mann, came up and said he thought Valak had drowned—after we had to strike out for ourselves. I said I thought not. Since at that time I believed that Butryn was Valak.

After talking with Butryn this Monday morning, I am certain that Valak is in the channel although I went out to look this morning and could see nothing at low tide. The channel is still deep at low tide. Army and Navy Rescue parties have been notified.

Given on the 10th day of November, 1947.

/s/ JOHN V. McNALLY.

Claimant's Exhibit "B"—(Continued)
Statement by Hugh N. Pendleton

On Sunday afternoon, Nov. 9th, at about 4:00 p.m., my wife, 3 children, the Alexanders' daughter, Jim Wades daughter and I were bathing close to the beach at Camp Ethridge (near the sump for the 12 inch pump). I noticed a man standing in water up to his knees on the north edge of the channel through the reef about a quarter of a mile or a little less from shore. He was waving his arms frantically and when I had gotten my party to shore and climbed up on a rock I could make out a man swimming in the channel about 150' south of the man who was standing. Two men took to the water at the beach and swam toward the man in the channel and several more were wading out. Since I knew that the current in the channel was very strong, I was sure that anyone, no matter how good a swimmer, would be in serious trouble who went out in deep water.

I saw Mr. Jackson in the crowd of spectators at the pool and asked him what was being done to help the man. He said that they had called for a rescue plane. Being afraid that a plane would be too late, I obtained an empty oil drum from the generator house and tied a piece of rope about ten feet long around it and put knots in the loose ends, so that it would be easy to hold to. George Smith, another man and I took this barrel out along the south edge of the channel to a point where the cur-

Claimant's Exhibit "B"—(Continued)

rent would carry the barrel near the four men who were all I could see in the channel, at that time (I would guess about 4:30). Smith, not being a good swimmer, I asked him to go back when we were about half way out, since there are deep holes along the edge of the channel where it was necessary to swim to gain a footing again. The man whose name I did not know, said he was a good swimmer. As we got to the point where we were to release the barrel, the water was chest deep and the current dragged us into the channel. I called to the other man to swim back but he thought he should stay with the barrel. It took me about five minutes to get back to the edge of the channel where I could stand, a distance of about 15 feet (I know this because I could make out the edge of the channel with my face in the water).

As I regained my footing, I turned and saw three of the four men, none of whom I could recognize at that distance, about 100 yards, holding onto the barrel. The fourth was about 150' from me and trying to swim toward me. I did not recognize him at the time, but found out later that he was M. D. Mann. I shouted to him to float down to the barrel but he could not understand. I later found that he swam directly toward the beach till he reached footing and aid.

I returned to the beach where I got another drum and where McAdams, a man working at Camp Ethridge, got about 150' of 3/8" rope. Lonnie Bowden

Claimant's Exhibit "B"—(Continued)

and I started to take this barrel out to the island at the south side of the channel at the reef where we planned to drift it over to the other barrel and pull them all in. We were overtaken by a man whose name I don't know, who insisted on coming along to help (we pulled him out of holes all the way out). About half way out, there was a man swimming toward shore on a piece of plywood. He said he was all right and waved us away. We reached the island where the current was setting toward the men on the barrel in the channel. The current there was about 3 m.p.h. and as we started to drift the barrel out, our helper was swept off into deep water and had to hold onto the barrel. We let the barrel on out and instead of bringing both barrels back as planned, one man and our helper came back. At that point, a Duck from the 1st Marine Brigade arrived and picked all of us up. On the way to shore, I saw that the man who had gone out with the first barrel was aboard and in good shape and that Mr. McNally was one of the ones picked up. One man seemed to be in very bad shape and was receiving first aid treatment from Mr. Morris.

On arriving at the beach, I talked to K. T. Lord, who told me that, after I had left with the 2nd barrel, he had borrowed a car, gone to Camp Witek, and after a good deal of trouble had gotten permission to get a duck if he could find a driver. He got a driver out of his barracks and then had to get

Claimant's Exhibit "B"—(Continued)

the only seaworthy Duck towed to get it started, since it had no battery. It was due entirely to his effort that help came when it did.

I also found that Mann had made shore and was all right.

/s/ HUGH N. PENDLETON.

/s/ DANA SACRESSEN,
Witness.

Dated: 15 November, 1947.

Mr. Adams: That is all of our testimony. It is very difficult to find any of these witnesses and I will appreciate having that stipulated to.

Mr. Franklin: Yes. We have no objections.

CHARLES E. MORRIS

was duly sworn and testified as follows:

Mr. O'Leary: Give us your full name and address?

A. Charles E. Morris, 1007 Lenora Street, Seattle, Washington. This is my place of business because I travel.

Direct Examination

By Mr. Franklin:

Q. During the year 1948 where were you employed?

A. I was on the Isle of Guam until July fifteenth of that year.

(Testimony of Charles E. Morris.)

Q. Employed by whom?

Mr. O'Leary: You mean 1947, Mr. Franklin?

Q. I beg your pardon. In 1947 where were you employed? A. Isle of Guam.

Q. Employed by whom?

A. Brown-Pacific-Maxon.

Q. In what capacity?

A. As First Aid Supervisor.

Q. At what particular place in Guam?

A. I was at the main camp but I had supervision over all [11] the other First Aid Stations. I supervised first aid work of the men and the nurses and the dispensary, served as Administration Officer, handling compensation 202 and 204 forms and doing actual medical work in the absence of the doctors, that which could be done by first aid men.

Q. On the afternoon of November 9, 1947 where were you?

A. On November ninth, if it was the Sunday on which it occurred, I was out relieving the regular men at Camp Ethridge.

Q. Where was Camp Ethridge located, what part of Guam?

A. It was down toward the end of the Island, close to Camp Dealy.

Q. Would you tell us what Camp Ethridge was?

A. It was a recreation center which was open to any civilians on the island, providing they were employed by the contractor.

Q. What facilities were there?

(Testimony of Charles E. Morris.)

A. They had a huge swimming pool, indoor ping-pong tables and picnics and they had a Club where they could get beer and sandwiches, etc.

Q. Under whose supervision and control was Camp Ethridge?

A. It was under the control of the Navy, although Brown-Pacific-Maxon supervised it.

Q. What employes of Brown-Pacific-Maxon were permanently employed at Camp Ethridge? [12]

A. Everybody that was there; the Camp Manager, the Security Police, our first aid people, and the cooks and waiters, and anyone who were in attendance.

Q. What was the function of the Security Police?

A. To keep order, because sometimes the boys did get a little rough, and to enforce any rules and regulations.

Q. What rules and regulations existed as to where one should swim?

A. There was a huge sign posted, as I recall, it was on a door opposite the swimming pool, and one on the bath-house. This was the main entrance to the camp. (Indicating on a sketch.) And there was one right here (indicating) and then as we came in off the main road, the highway number 4 there was a sign on the door and on those it gave all the regulations, for instance, no swimming in the channel, and besides, no one permitted on the reef, and nobody drinking in the pool and no picnicking.

(Testimony of Charles E. Morris.)

Q. Were those regulations publicly displayed?

A. Yes.

Q. Why were those regulations posted—prohibiting swimming in the channel?

A. Because the Navy had lost several people and others had drowned. There was a mimeographed sheet came to all of the supervisors and I believe it was signed by the Governor of the Island or the Commandant of Police, prohibiting people on those reefs and keeping them from any disaster, because a number of people had lost their lives.

Q. Were there any life guards maintained on the Island for the land based pool at Camp Ethridge?

A. Yes, we had a life guard there. The civilians were permitted to use it and any of the engineering company, providing they were not in the military.

Q. Now, you have spread in front of you a sketch and I will ask you if you can state generally what area that sketch is?

A. This is the complete area of Camp Ethridge. The entrance by the highway comes in here (indicating). This is our First Aid Station. This is where we park our ambulances. This is the dressing room and this is the swimming pool. This is the shoreline and this is the sand where the men lie out in the sun.

Q. Where was the pool, as designated on the chart?

A. Right here (indicating).

Q. And on either side of the pool there was a

(Testimony of Charles E. Morris.)

sandy area where the recreationists could bask in the sunshine?

A. Yes. It was used more on this side for basking in the sunshine and more on this side for cooking, and they permit wading.

Q. Does this map represent the general physical situation of the buildings, location of the channel on the date of Mr. [14] Valak's drowning?

A. Yes. There has been no change.

Mr. O'Leary: This is a drawing with the stamp of Brown-Pacific-Maxon, Guam Contractors, dated July 14, 1948, apparently prepared by one, Shireman, contract number NOY-13931, which will be received in evidence and marked Carrier's Exhibit "A."

Q. (By Mr. Franklin): Mr. Morris, referring to Carrier's Exhibit "A": Would you explain what the shoreline represents?

A. That is where the water or tide came in there. This is all coral heads all through here. (Indicating.)

Q. What area are you referring to?

A. The whole area. It is covered with coral heads.

Mr. O'Leary: That is the characteristic of it?

A. Yes.

Q. (By Mr. Franklin): I see the designation of the channel. What is that?

A. Out here is a reef, which is a huge wall like a breakwater only it is not built. It is natural, and

(Testimony of Charles E. Morris.)

upon that the ocean waves beat and at high tide is covered. This channel comes clear through to this particular river. I don't know its name, and that river, by running at low tide, it becomes quite deep. When the tide is full it covers that completely to the shore line at high tide. When it is coming [15] in the water rushes in very rapidly and when the tide goes out, it goes out with a tremendous power. The pulling power that you get into the channel—you can't get out unless somebody gets you out.

Q. How did you designate the barrier over which the tide swept in there? A. Coral reef?

Q. Yes.

A. This is the edge right here. (Indicating.)

Q. Here is the edge?

A. Yes. I believe it would be about a half mile but I am not sure.

Mr. O'Leary: It was about a half mile out?

A. Yes.

Q. (By Mr. Franklin): Getting down to what happened in the afternoon of November 9, 1947, will you tell the Commissioner what, if anything, unusual occurred and what developed in reference to Mr. Valak drowning?

A. I am sorry; your question in reference to Mr. Valak drowning, if you want to assume—I was there—well, about four o'clock, approximately thereof, on this Sunday afternoon, I was in the First Aid Station.

Q. Will you put the figure 1 on Carrier's Exhibit "A" and encircle it? [16]

(Testimony of Charles E. Morris.)

A. Yes. While I was taking care of a person who had scratched himself at the pool, Mr. Jackson, he happened to be with me and he was the head of the insurance carrier there and a man rushed in and got hold of Mr. Jackson and says: "There is a man, or two men, in trouble at the reef."

Q. What time of day was that?

A. Somewhere between 3:30 and 4:15. It was approximately four o'clock.

Q. What day of the week? A. On Sunday?

Q. What did you do?

A. I immediately turned my patient over to another person and ran out to the edge of the swimming pool. There is a pile of rocks right where this reef is and as was pointed out to me, the man in question was located about this position. (Indicating.)

Q. Would you put the figure 2 on Carrier's Exhibit "A" at that point?

A. Right about there. (Indicating with mark of figure 2.) The first thing I looked for was the channel, because if he was in there, nobody could save him. I observed him for probably five minutes.

Q. How far away was he?

A. I would say he was almost a half mile and it was hard to distinguish, although there seemed to be three people. [17] There seemed to be three people at that spot.

Q. Could you tell whether they were on a reef?

A. No. They appeared to be hanging onto some-

(Testimony of Charles E. Morris.)

thing. A man stepped up and said to me "Doc, maybe you can tell with these" and he handed me a pair of field glasses. And I noticed one—there was only two men and they were hanging onto someone and one of the two separated and started and headed for the channel and then is when I knew we would have trouble, if the man continued and I knew we would never get him. So we debated for a second.

Q. Was the man swimming?

A. He was trying to swim, because there was places where it was shallow and you could walk; and the tide was falling and I think it was full, and the water was clear up to the shoreline and was going out.

Q. What did you do next?

A. We called Chief Bennett and he came up and the three of us debated for a second and finally a crowd of people gathered together around the pool. There must have been 500 people, and twenty-five or thirty gathered around me. It didn't appear they were in trouble because they could have walked in. They could have got in on this side, but when he headed for the channel, that is what alarmed us. One man was walking——

Q. (Interposing) And one man was holding onto something [18] in the vicinity of "Point 2"? (Indicating on sketch.)

A. Yes. The first remark I made to Captain Bennett was: "Don't permit anyone to go out after that man. That's an order." And I was in charge.

(Testimony of Charles E. Morris.)

The life guard was getting a sandwich and a cup of coffee and we sent for him. Captain Bennett gathered his men together and lined the pool to prevent anyone going in.

Q. Pursuant to that order, were those men lined up? A. Oh, yes.

Q. After he gave them the orders, what did the security police do?

A. They immediately started to patrol the shoreline and Captain Bennett remained up here. (Indicating) Then I went to the Camp Manager's quonset hut, which is not shown on this map. There is where the only telephone is located—on an island of that size—where a telephone is under cover. When I went to use the 'phone my first thought was to secure a Navy air-sea rescue based at Orota. We had standing orders to notify them in case of any off-island emergency. However, the 'phone line was dead. So I came back and Mr. Jackson came with me, and I called to Mr. Jackson that I could not get through and was going to the Marine Center Gate. I took the ambulance and went down to the first Marine Center Gate and I put in a 'phone call there to Erota and told them the trouble and gave them the exact location as to where these [19] men were located and by the exact location I said "Directly off Camp Ethridge where the channel enters through the coral reef." That was where I described it and they promised to send a rescue boat.

(Testimony of Charles E. Morris.)

Q. What period of time would you say it was until you returned to the shore line?

A. About ten minutes. When I got back here a number of people had gotten by the security police, although I started to raise Cain because they were going out, and Captain said "What am I going to do—shoot them?"

Q. How many went out?

A. Eight or ten men going out then and immediately I sent a man, one of my own men, and I can't recall the man's name, over to the Camp Manager's office to 'phone again, and he made an attempt to get a clear line this time. And then I picked up the 'phone and notified our Senior Medical Officer, who was Doctor John Marsh, and asked him to send us all available ambulances and the high pressure air tanks for the inhaler and the inhaler that was located at Camp One. The guards kept trying to push people back and they just would not listen.

Q. Do you know whether or not a rescue squad was organized under the supervision of Captain Bennett?

A. Not directly under Captain Bennett but Mr. McNally, who was the Camp Manager, and Mr. Pendleton, who was the [20] Superintendent. Pendleton got these two or more empty oil cans, those big fifty gallon drums. That was while I was gone that they started that. And when I got back there they were pushing those things and going out

(Testimony of Charles E. Morris.)

from this side, and on the other side and at the same time some men who had been down to the Coral Club had seen this man over here and they started out from here, and we don't know how many more people started out, because there were picnic parties all around here. Now, this spot is visible, Point Two is visible almost down to Camp Dealy.

Q. The would-be rescuers—were they authorized by the police to make the rescue?

A. I can't answer that because it happened while I was away.

Q. When you returned then, what did you observe as to the position of the two men you noted previously?

A. The men who had given us the field glasses were still standing at this point on the shore line. This man we left here was now in the channel and attempting to swim in.

Q. In the bed of the channel?

A. He had got over to the channel and was attempting to come ashore, thinking he could swim against it.

Q. And was it a dangerous current that he was bucking?

A. He could not make any headway and was going out. The man had come in to this angle here and he apparently then was hanging onto something and when I saw him the second time [21] he was at this spot here.

(Testimony of Charles E. Morris.)

Q. Put a figure 3 where the man was seen by you in the channel.

A. Yes, about that position. (Indicating on sketch.) And he was still holding onto something. By that time the mob got so big you couldn't tell anybody anything. I tried; I begged; and Mr. Jackson was there; and the girls and women begged them to stay out of the channel but they went out anyhow.

Q. What were the police doing?

A. They were saying: "Don't go into the channel" but they couldn't stop them. The life guard in the meantime had gone out and he was trying to get out to the man and the life guard was just entering the channel and was about to swim. Mr. McNalley and Mr. Pendleton—I could see the barrels—and the other one was in the channel, but I don't know who had that. At that I became alarmed and somebody came up and said "Why don't you get the amphibious duck" and there was one there and I went back to the 'phone and told the operator that it was an emergency and to keep the line open until it was ordered closed by Captain Bennett and myself and she agreed to do that. She put my call through and I talked to someone at Marine Base and they told me an amphibious duck would be there in ten minutes, and would I have a "medic" to go out with them, and I identified myself [22] as the Medical Officer in Charge and if they would stop I would go; and then when I came back this

(Testimony of Charles E. Morris.)

time that channel was full of bobbing heads, eighteen or twenty men.

Q. All would-be rescuers?

A. I don't know. They were out there. Now, which of these men that were out there, I don't know. They were here and some here and some here (indicating) and everybody was going out.

Q. How many in all were going out?

A. Twenty-five or thirty people, I would say, were trying to get out there. I picked up my inhaler and went back and they brought the inhaler and extra oxygen tanks.

Mr. O'Leary: Let us get to the meat of this thing and find out what happened eventually. Can you tell us about Mr. Valak's appearance, or the other men who were drowned? Just tell us what the outcome was.

A. When the amphibious duck came we went out here and pulled in those eight men. The first man was unconscious and I went to work on him with the inhaler, and the other men were pulled in rapidly and everybody came back and we only pulled in eight, one of whom was Mr. McNally; and the ambulances, and we went back the second time and all came back from the reef and we were out there until dusk because they told us one man was missing. They cleared everybody out and found the extra clothes, hanging in the bath house. [23]

Q. (By Mr. O'Leary): You did not know the identity of that man at that time?

(Testimony of Charles E. Morris.)

A. No. I begged everybody to identify that man.

Q. In other words, he was one of the two men who caused this commotion? A. Yes.

Q. (By Mr. Franklin): Of those two men at Point Two, one of the men was a Brown-Pacific-Maxon employee?

A. No, but one of the men we pulled out breathing was.

Q. Were you able to identify either of the two men at Point Two?

A. No. At four o'clock I received a call, at four o'clock in the morning, that one of the bodies was coming in, and I went down, and I believe that was Mr. Valak, and at one o'clock a Guam fisherman had been dynamiting and up came the second body.

Q. Do you know the name of the other party?

A. I believe his name was Modahl.

Q. (By Mr. O'Leary): They were the two men who were drowned as a result of the excitement?

A. Yes.

Q. Will you please tell me what arrangement the contractors had for the transportation of these men to this [24] recreation center? Were these men transported by Brown-Pacific-Maxon?

A. You could go anywhere you wanted to. I believe there was a bus.

Q. (Questioned—Question repeated.)

A. I can't tell you that because the Recreation Department put that in service; when I left, I know there was a bus and had been for some time. The

(Testimony of Charles E. Morris.)

bus went out every hour and any man who wanted to go swimming made application.

Q. Did Mr. Valak make application for transportation?

A. No. He didn't make any application. He just went out there. Anybody could ride on it.

Q. Was there any fare charged the men to go on that trip? A. No charge.

Q. In other words, that was part of the recreation facilities offered by Brown-Pacific-Maxon?

A. Yes.

Q. This was done on Sunday?

A. No. It was every day in the week.

Q. I presume Sunday was the busy day?

A. Saturday afternoon and Sunday were the busy days. Night men would get to go before they went to work.

Q. And the employer would see to it that they were given transportation?

A. Only in that bus. [25]

Q. Would the supervisors use their own jeeps to go there if they wanted to? A. Yes.

Cross-Examination

By Mr. Adams:

Q. You testified about the signs that were put up there. Who had those signs put up?

A. They had Mr. Towne's signature but I don't know who had them put up.

Q. Did Brown-Pacific-Maxon have them put up?

A. I assume so, as Towne's signature was on it.

(Testimony of Charles E. Morris.)

Q. Did that Company maintain that recreation center there for the employees? A. Yes.

Q. Do you know where John Valak was at the time just before he started to swim out?

A. No, I do not.

Q. Did the Brown-Pacific-Maxon Company operate on Sunday?

A. Oh, yes; seven days a week.

Q. They had employees working on Sundays in their operation?

A. In the operation of Camp Ethridge, yes?

Q. Do you know whether John Valak was working that day?

A. Not as an employe of the camp. I saw John Valak brought in and identified him, but I was not at that lunch table. [26]

Mr. O'Leary: I believe Mr. Adams' question deals with the question of whether the operations were closed down on Sunday.

Witness: Some of the men worked on Sunday and got paid for it and some did not.

Q. (By Mr. Adams): Did the employees have specific hours to work or were they on call?

A. I think they had specific hours to work. The only ones that would be on call would be our own Department, emergency police, and the electrical crew.

Q. Did you know John Valak?

A. No, I did not.

Mr. Adams: I think that is all.

Mr. O'Leary: I think we have covered the situation as well as we can.

Mr. Franklin: The employer and carrier at this time request a continuation for the purpose of introducing additional testimony, particularly the testimony of Mr. S. D. Jackson and Tom S. Richards, both of whom reside in the vicinity of Los Angeles, California.

Mr. O'Leary: I have no objection to continuing the case and transferring it, if necessary, to Deputy Commissioner Pillsbury for the purpose of taking the testimony of these two gentlemen. I don't know what additional testimony [27] can be added by Mr. Jackson to what Mr. Morris has already told us. As far as Mr. Richards is concerned, I know nothing about his connection with the case. Perhaps it might be well, Mr. Franklin, to take this matter of continuation up with the carrier, and if the carrier still feels it would like the case sent to Mr. Pillsbury for the purpose of taking the testimony of these two witnesses, I will be very glad to do so. Mr. Adams, do you have any objection to this?

Mr. Adams: For the record, I would object.

Mr. O'Leary: You are located in Aberdeen and I don't know whether you would be able to arrange for this continued hearing. However, if it is not possible for you to be present, I can assure you the position of the claimant will be protected by Commissioner Pillsbury.

Mr. Adams: If you can get the statement from

those two witnesses, a letter or statement, and submit it to me, I might stipulate it be admitted. I want everything to go in because I don't know everything about it and it is hard to find witnesses who do know.

Mr. O'Leary: Do you believe it would be possible to obtain the statements from these gentlemen and submit them to Mr. Adams, and if you gentlemen agree—that will eliminate sending the case to Mr. Pillsbury.

Mr. Franklin: Yes.

Mr. Adams: Yes.

Mr. O'Leary: The hearing is adjourned at this time, sine die.

(Adjournment: 2:10 p.m.) [28]

CERTIFICATE

State of Washington,
County of King—ss.

I, James Trail, do hereby certify that I am a regularly qualified and acting court reporter in the State of Washington, and that as such reporter I reported in shorthand the above entitled hearing, and that thereafter the same was transcribed by myself; that the within and foregoing is a true and correct transcript of the stenographic notes taken by me during the hearing in the above entitled cause.

Dated this sixteenth day of February, 1949.

/s/ JAMES TRAIL.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure as amended, I am transmitting herewith as the record on appeal in the above entitled cause, all of the original pleadings on file and of record in said cause in my office at Seattle, as set forth below and that said pleadings and papers constitute the record on appeal from the Decree of Dismissal and order confirming the compensation order and award, filed and entered August 18, 1949, to the United States Court of Appeals at San Francisco, California, to-wit:

1. Petition for Injunction, with copy of Compensation Order and Award of Deputy Commissioner attached.
2. Summons with Marshal's return thereon.
3. Marshal's Amended Return on Summons.
4. Appearance of U. S. Attorney for Defendant.
5. Motion of Defendant to Dismiss petition. (Memo. attached.)
6. Plaintiff's Memorandum

7. Findings of Fact and Conclusions of Law.

8. Decree dismissing complaint and confirming award of Deputy Commissioner.

9. Notice of Appeal. (Letter to U. S. Attorney attached.)

10. Cost Bond on Appeal. (Fireman's Fund Ind. Co. $250.00.)

11. Designation of Contents of Record on Appeal.

12. Transcript of Hearing before Deputy Commissioner at Seattle, February 11, 1949, with Claimant's Exhibits "A" and "B" attached. (Carrier's Exhibit "A," Area map showing location of drownings, not filed in Clerk's Office as part of transcript.)

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 21st day of September, 1949.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 12366. United States Court of Appeals for the Ninth Circuit. Brown-Pacific-Maxon, Inc., a corporation and Hartford Accident and Indemnity Company, a corporation, Appellant, vs. J. J. O'Leary, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: September 23, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit
No. 12366

BROWN-PACIFIC-MAXON, INC., a corporation, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,

Appellants,

vs.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act,

Appellee.

STATEMENT OF POINTS RELIED UPON BY APPELLANTS

Appellants, Brown-Pacific-Maxon, Inc., a corporation, and Hartford Accident and Indemnity Company, a corporation, propose on their appeal to the United States Court of Appeals for the Ninth Circuit to rely on the following points as error:

1. The court erred in holding that the deceased, John Valak, was a workman in the course of his employment at the time he was drown at Guam on November 9, 1947.

2. The court erred in holding that Mary Valak, mother of the deceased, John Valak, was entitled

to compensation for his death under the terms and provisions of the Longshoremen's and Harbor Workers' Compensation Act.

BOGLE, BOGLE & GATES,
/s/ EDW. S. FRANKLIN,
Attorneys for Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 10, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD

Plaintiffs, Brown-Pacific-Maxon, Inc., a corporation, and Hartford Accident and Indemnity Company, a corporation, herewith designate the following as those portions of the record and proceedings herein which they deem should be contained in the record on appeal of this cause to the United States Court of Appeals for the Ninth Circuit:

(1) Transcript of Hearing held before Deputy Commissioner on February 11, 1949.

(2) Compensation Order and Award of death benefits by Deputy Commissioner dated March 2, 1949.

(3) Plaintiff's Petition for Injunction filed March 29, 1949.

(4) Defendant's Motion to Dismiss Petition filed June 3, 1949.

(5) Findings of Fact and Conclusions of Law filed August 18, 1949.

(6) Decree filed August 18, 1949.

Notice of Appeal.

Clerk's Certificate.

BOGLE, BOGLE & GATES,

/s/ EDW. S. FRANKLIN,

Attorneys for Plaintiffs.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12366

BROWN-PACIFIC-MAXON, INC., A CORPORATION, AND HARTFORD ACCIDENT AND INDEMNITY COMPANY, A CORPORATION, APPELLANTS

vs.

J. J. O'LEARY, DEPUTY COMMISSIONER, FOURTEEN COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLEE

Appeal from the United States District Court for the Western District of Washington, Northern Division

Proceedings Had in the United States Court of Appeals for the Ninth Circuit

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, May 8, 1950

Before: DENMAN, Chief Judge, STEPHENS and ORR, Circuit Judges

ORDER OF SUBMISSION

ORDERED appeal herein argued by Mr. Edward S. Franklin, counsel for appellants, and by Mr. Vaughn Evans, Assistant United States Attorney, counsel for appellee, and submitted to the court for consideration and decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Friday, May 26, 1950

Before: DENMAN, Chief Judge, STEPHENS and ORR, Circuit Judges

Order Directing Filing of Opinion and Filing and Recording of Judgment

ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12,366. May 26, 1950

BROWN-PACIFIC-MAXON, INC., A CORPORATION, AND HARTFORD ACCIDENT AND INDEMNITY COMPANY, A CORPORATION, APPELLANTS

vs.

J. J. O'LEARY, DEPUTY COMMISSIONER, FOURTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, APPELLEE

Appeal from the United States District Court for the Western District of Washington, Northern Division

Before: DENMAN, Chief Judge, and STEPHENS and ORR, Circuit Judges

DENMAN, *Chief Judge:*

This is an appeal from a judgment confirming a compensation award against appellant employer and its insurance carrier for the death of one John Valak made under the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 901 et seq., hereinafter called the Act. Valak was drowned in an attempt to rescue an unknown person from a reef off the Coast of Guam. The ground of the appeal here is that the attempt to rescue the distressed unknown was not any work arising out of or in the course of Valak's employment nor in any recreation engaged in for his employer's benefit.

The uncontradicted testimony is that for the recreation of employees of the appellant employer it maintained a recreation center at a place on the Island of Guam called Camp Ethridge, situate on the shore of the island. There was provided by the employer at the camp a swimming pool on the camp grounds and a club where employees could get beer and sandwiches. The recreation center was open to any civilians on the island provided they were employed by other contractors on the island. The employer furnished a bus, fare free, for its employees to go to the camp every day, Sundays included. In fact Sunday was the busiest day at the camp. Any employee of the employer appellant could ride on the bus and use the recreation facilities.

Half a mile at sea and parallel with the shoreline of the camp was a reef on the inshore side of which ran dangerous currents. There was a huge sign posted on the door opposite the swimming pool and one on the bath-house stating all the regulations for the use of the camp, among them a prohibition of swimming in the

channel near the reef, and that no one was permitted on the reef. On the Sunday in question, Howard Barenthin, Robert Barnum, John Valak and Henry P. Butryn, all employees of appellant employer, were preparing to get on the bus and leave Camp Ethridge. As they started to leave, John Valak heard someone on the reef asking for help and the four employees raced to the waterfront to assist in the rescue. These four employees, as far as can be ascertained from the record, were the first persons to see the man in distress. Valak and Butryn went to the rescue of the man on the reef. In his attempt to save the life of the person on the reef, Valak lost his life by drowning in attempting the passage through the forbidden area of the dangerous current. Immediately following the attempt of Valak and Butryn to rescue the unknown man, a rescue squad was organized and a number of other persons who likewise attempted the rescue were saved by the guards and security police.

This court has held that in the use of such facilities for the employee's recreation, such recreation is an incident of his employment. Liberty Mutual Ins. Co. v. Gray, 137 F. 2d 926, 928 (Cir. 9). However, we cannot agree with the commissioner that Valak, having finished his recreational use of the camp and about to get into a bus to leave it, was engaged in the recreation provided by his employer for the improvement of the quality of Valak's services, when he left the bus and made the gallant sacrifice of his life in the forbidden currents moving alongside the reef half a mile offshore.

The lethal currents were not a part of the recreational facilities supplied by the employer and the swimming in them for the rescue of the unknown man was not recreation. It was an act entirely disconnected from any use for which the recreational camp was provided and not in the course of Valak's employment. Pillsbury v. Liberty Mutual Ins. Co., 143 F. 2d 807, 808; Northwestern Pac. R. Co. v. Industrial Accident Commission, 174 Cal. 297, 163 P. 1000, employee injured while aiding an injured passenger; Sichterman v. Kent Storage Co., 217 Mich. 364, 186 N.W. 498, employee injured while performing an "act of humanity entirely disassociated from the master's work."

The judgment is reversed and the compensation ordered is set aside.

(Endorsed:) Opinion. Filed May 26, 1950. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12366

BROWN-PACIFIC-MAXON, INC., A CORPORATION, ET AL., APPELLANTS

vs.

J. J. O'LEARY, DEPUTY COMMISSIONER, ETC., APPELLEE

JUDGMENT

Appeal from the United States District Court for the Western District of Washington, Northern Division

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division and was duly submitted

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed and the compensation ordered is set aside.

(Endorsed) Judgment.

Filed and entered May 26, 1950.

PAUL P. O'BRIEN,
Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12366

BROWN-PACIFIC-MAXON, INC., A CORPORATION, ET AL., APPELLANTS

vs.

J. J. O'LEARY, DEPUTY COMMISSIONER, ETC., APPELLEE

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, PAUL P. O'BRIEN, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-eight (68) pages, numbered from and including 1 to and including 68, to be a full, true and correct copy of the entire record of

the above-entitled case in the said Court of Appeals, made pursuant to request of Honorable Philip B. Perlman, Solicitor General of the United States, counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 24th day of July, 1950.

[SEAL.] (Sg.) PAUL P. O'BRIEN,
Clerk.

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